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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

ROBERT MARK KAPRAL,

Cross-complainant and Respondent,

v.

VDC, LLC, et al.,

Cross-defendants and Appellants.

F070585

(Super. Ct. No. CV281230)

OPINION

APPEAL from an order of the Superior Court of Kern County. David R. Lampe, Judge.

LeBeau-Thelen and Andrew K. Sheffield for Cross-defendants and Appellants.

Brumfield & Hagan and Christopher J. Hagan for Cross-complainant and Respondent.

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Appellants, VDC, LLC (VDC) and Gordon Downs, challenge the trial court's denial of their special motion to strike the defamation cause of action alleged by

respondent Robert Mark Kapral, as a strategic lawsuit against public participation (SLAPP) under Code of Civil Procedure¹ section 425.16. The trial court concluded that appellants failed to carry their threshold burden of showing that this cause of action arose out of appellants' exercise of their right of petition or free speech.

Appellants contend the trial court erred. According to appellants, Kapral's defamation cause of action is based on statements made by Downs to government officials either: in connection with official review proceedings regarding a development plan; in connection with a public issue or an issue of public interest; or relating to contemplated litigation. Therefore, appellants argue, the cause of action arose from Downs's protected activity.

The trial court correctly concluded that appellants failed to carry their burden. Accordingly, the order will be affirmed.

BACKGROUND

In 2010, McFarland Partners, LLC entered into an agreement with the City of McFarland (City) to develop residential housing tracts in the City. Downs and Kapral signed the development agreement on behalf of West Coast Communities, LLC. West Coast Communities managed McFarland Partners.

VDC was created in 2011 to develop real property into residential housing tracts in the City. Under VDC's operating agreement, the RMK Group (RMK), a corporation owned by Kapral, was VDC's designated manager.

Thereafter, McFarland Partners conveyed the lots subject to the development agreement to VDC. As the successor in interest to McFarland Partners, VDC was bound by the development agreement with the City.

¹ All further statutory references are to the Code of Civil Procedure unless otherwise stated.

The development agreement provides that the City may review the agreement from time to time but no less than annually. During such review, the developer must demonstrate good faith compliance with the development agreement's terms.

VDC, through Downs, was in contact with City officials regarding the development. According to Downs, any information passed to the City was given in an effort to keep the City apprised of all events that could affect the development.

In April 2013, Kapral's relationship with certain City officials became strained. Kapral drafted an e-mail to four City officials dated April 17, 2013, stating he wanted to apologize "for anything I have said or done ... that has led to a breakdown in my relationship with all four of you. It has never been my intent to do anything that would create hard feelings between myself and the city staff and Mayor. I strive way to hard at times to bring a resolution to issues and documents important to the project, and unknowingly offend anyone of you. I would like an opportunity in the near future to begin rebuilding relationships with each one of you."

On May 5, 2013, Kapral sent a letter to Downs explaining that he had used VDC funds and was accounting for these expenses under a loan account. The total Kapral owed to VDC was approximately \$39,500. Kapral further explained that his intent was to credit these draws from management fees he was expecting to earn but various delays in building and closing homes had postponed his receipt of those fees. According to Kapral, he made these draws because his base pay simply was not enough to cover his personal expenses. Kapral also offered to submit the accounting to back up this information at Downs's request.

On May 6, 2013, Downs signed a resolution of the members of VDC removing RMK and Kapral as the VDC manager.

In February 2014, appellants filed a complaint against Kapral and RMK alleging causes of action for breach of fiduciary duty, conversion, embezzlement/theft, breach of

contract, receipt of stolen property, and unjust enrichment. The complaint alleged that Kapral had mismanaged VDC and had stolen \$303,000.

In May 2014, Kapral cross-complained against VDC and Downs. Kapral alleged causes of action for quantum meruit, defamation, and indemnity. Regarding the defamation claim, Kapral alleged that beginning in April 2013 and continuing, Downs made statements to various City of McFarland officials attacking Kapral's competence and accusing Kapral of: stealing money from one or more companies where Downs holds a financial interest; harming relationships with California Housing & Community Development and the City of McFarland; and mismanaging VDC.

Appellants filed a special motion to strike Kapral's cause of action for defamation as a SLAPP under section 425.16. Appellants argued the alleged defamatory statements were entitled to protection as acts in furtherance of their right of petition or free speech. According to Downs, he made these statements in connection with either an issue under consideration or review by an executive body or an issue of public interest. Downs also claimed these statements were made in anticipation of litigation.

The trial court denied the motion. The court concluded that appellants had not carried their burden of showing that the challenged cause of action arose from protected activity.

DISCUSSION

1. *The anti-SLAPP statute.*

Section 425.16 was enacted in 1992 to provide a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235.) It is California's response to meritless lawsuits brought to harass those who have exercised these rights. (*Church of Scientology v. Wollersheim* (1996) 42 Cal.App.4th 628, 644, disapproved on another ground in *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 68,

fn. 5.) This type of suit, referred to under the acronym SLAPP, or strategic lawsuits against public participation, is generally brought to obtain an economic advantage over the defendant, not to vindicate a legally cognizable right of the plaintiff. (*Kajima Engineering & Construction, Inc. v. City of Los Angeles* (2002) 95 Cal.App.4th 921, 927.)

When served with a SLAPP suit, the defendant may immediately move to strike the complaint under section 425.16. To determine whether this motion should be granted, the trial court must engage in a two-step process. (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 76.)

The court first decides whether the defendant has made a threshold showing that the challenged cause of action is one “arising from” protected activity. (*City of Cotati v. Cashman, supra*, 29 Cal.4th at p. 76.) The moving defendant must demonstrate that the act or acts of which the plaintiff complains were taken “in furtherance of the [defendant’s] right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue” (§ 425.16, subd. (b)(1); *Equilon Enterprises v. Consumer Cause, Inc., supra*, 29 Cal.4th at p. 67.) If the court concludes that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 88.)

The questions of whether the action is a SLAPP suit and whether the plaintiff has shown a probability of prevailing are reviewed independently on appeal. (*ComputerXpress, Inc. v. Jackson* (2001) 93 Cal.App.4th 993, 999.)

2. Appellants did not meet their burden of demonstrating that the allegedly defamatory statements were entitled to protection under section 425.16.

Section 425.16, subdivision (e), clarifies what speech constitutes an “act in furtherance of a person’s right of petition or free speech under the United States or California Constitution in connection with a public issue.” Such speech includes: “(1)

any written or oral statement or writing made before a legislative, executive, or judicial proceeding, or any other official proceeding authorized by law, (2) any written or oral statement or writing made in connection with an issue under consideration or review by a legislative, executive, or judicial body, or any other official proceeding authorized by law, (3) any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest, or (4) any other conduct in furtherance of the exercise of the constitutional right of petition or the constitutional right of free speech in connection with a public issue or an issue of public interest.” (§ 425.16, subd. (e).)

a. Statements made in an official proceeding or in connection with an issue under consideration or review by a legislative body.

Government Code section 65865.1 provides that a development agreement entered into by a city must “include provisions requiring periodic review at least every 12 months, at which time the applicant, or successor in interest thereto, shall be required to demonstrate good faith compliance with the terms of the agreement.” To meet this requirement, the development agreement at issue here provides,

“[T]he CITY *may* review this Agreement from time to time but no less than annually during which the DEVELOPER, or its successors-in-interest shall, at their sole cost and expense, demonstrate good faith compliance with its terms. DEVELOPER shall prepare such reports as required by CITY during each review.” (Italics added.)

Appellants contend Downs made the allegedly defamatory statements in connection with the City’s review of the development agreement and that this review was an official proceeding. Therefore, appellants argue, the speech is protected under section 425.16, subdivision (e)(1) and (2).

To fall under the protection of section 425.16, subdivision (e)(1) and (2), the statements need not concern an issue of public interest. All that matters is that the statements be made in an official proceeding or in connection with an issue being

reviewed by an official proceeding. (*Briggs v. Eden Council for Hope & Opportunity* (1999) 19 Cal.4th 1106, 1116, 1123 (*Briggs*).)

To demonstrate that the alleged defamatory statements were made in connection with an official proceeding, appellants rely on Downs's declaration. Downs stated that he has no memory of making the statements attributed to him in the cross-complaint. Nevertheless, Downs declares that he was in constant contact with the City officials and that any communications would have related to VDC's development of the property in an effort to keep the City apprised of all events that could affect the development. "This would have included communications that related to the change in the management of VDC, LLC, the reasons underlying the change, and the proposed litigation that was going to be filed against Mr. Kapral."

However, the fact that the City had the power to review the development agreement from time to time and that such a review should have taken place at least annually, is not evidence that the City was officially reviewing the agreement when the alleged defamatory statements were made. Therefore, there was no evidence that the statements were made during, or in connection with, an official review proceeding. Thus, appellants have not met their burden of demonstrating the speech is protected by section 425.16, subdivision (e)(1) or (2).

b. Statements in connection with an issue of public interest.

Appellants contend that their statements fall under section 425.16, subdivision (e)(4), i.e., they were in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest. Appellants assert that VDC's business of constructing the residential housing development was of public interest to the City and its citizens because the success or failure of the development, and Kapral's management thereof, would impact the lives of many individuals in the City.

Protection under section 425.16 for statements in connection with a public issue or an issue of public interest is not dependent on those statements having been made in a

public forum. Rather, subdivision (e)(4) applies to private communications concerning issues of public interest. (*Terry v. Davis Community Church* (2005) 131 Cal.App.4th 1534, 1546.)

Section 425.16 does not define “an issue of public interest.” Nevertheless, the statute requires the issue to include attributes that make it one of public, rather than merely private, interest. (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132.) A few guiding principles can be gleaned from decisional authorities. For example, “public interest” is not mere curiosity. Further, the matter should be something of concern to a substantial number of people. Accordingly, a matter of concern to the speaker and a relatively small, specific audience is not a matter of public interest. Additionally, there should be a degree of closeness between the challenged statements and the asserted public interest. The assertion of a broad and amorphous public interest is not sufficient. Moreover, the focus of the speaker’s conduct should be the public interest, not a private controversy. (*Id.* at pp. 1132-1133.)

Being based on case law, the precise boundaries of a public issue have not been defined. Nevertheless, in each case where it was determined that a public issue existed, “the subject statements either concerned a person or entity in the public eye [citations], conduct that could directly affect a large number of people beyond the direct participants [citations] or a topic of widespread, public interest [citation].” (*Rivero v. American Federation of State, County and Municipal Employees, AFL-CIO* (2003) 105 Cal.App.4th 913, 924.) Because the term “public interest” is inherently amorphous, “[s]ome courts have noted commentary that ““no standards are necessary because [courts and attorneys] will, or should, know a public concern when they see it.”” [Citation.]’ [Citations.]” (*Cross v. Cooper* (2011) 197 Cal.App.4th 357, 371-372.)

In determining whether the communications at issue were in connection with an issue of public interest, the court looks for the principal thrust or gravamen of the cause of action, i.e., what the cause of action is based on. (*Hecimovich v. Encinal School*

Parent Teacher Organization (2012) 203 Cal.App.4th 450, 465.) The key is to examine “the *specific nature of the speech* rather than the generalities that might be abstracted from it.” (*Commonwealth Energy Corp. v. Investor Data Exchange, Inc.* (2003) 110 Cal.App.4th 26, 34.) In making this determination, the court considers the pleadings and the supporting and opposing affidavits stating the facts upon which the liability or defense is based. (*Dowling v. Zimmerman* (2001) 85 Cal.App.4th 1400, 1417.)

Appellants note courts have held that the prospect of large commercial and residential developments, with their potential environmental impacts, have been found to be matters of public interest. (*Tuchscher Development Enterprises, Inc. v. San Diego Unified Port Dist.* (2003) 106 Cal.App.4th 1219, 1234.) Here, however, when the alleged defamatory statements were made, the development was already agreed to, the plan was approved and the project was underway. Thus, the time for public input and discussion regarding whether such a development should occur had passed.

Further, the specific nature of the challenged statements did not concern the asserted public interest of residential development in the City. Rather, those statements were the product of a private dispute between the two developers who both had an interest in VDC. The alleged theft was from a private entity, not the City, and there was no evidence that Kapral’s alleged incompetence and mismanagement impacted the development in any way. Accordingly, appellants failed to satisfy their burden of demonstrating that the speech is protected under section 425.16, subdivision (e)(4).

c. Prelitigation communication.

Conduct that relates to litigation may qualify as an exercise of the constitutional right of petition under section 425.16. (*A.F. Brown Electrical Contractor, Inc. v. Rhino Electric Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1125 (*A.F. Brown*).) In fact, courts have adopted a fairly expansive view of what constitutes litigation-related activities within the scope of that section. (*Kashian v. Harriman* (2002) 98 Cal.App.4th 892, 908.) Moreover, section 425.16, subdivision (e)(1) and (2) are coextensive with the litigation

privilege of Civil Code section 47, subdivision (b). (*A.F. Brown, supra*, 137 Cal.App.4th at pp. 1125-1126.) Accordingly, communications preparatory to or in anticipation of the bringing of an action or other official proceeding are entitled to protection under section 425.16 and the litigation privilege. (*Briggs, supra*, 19 Cal.4th at p. 1115.)

However, the litigation privilege protects only prelitigation communications having some relation to an *anticipated* lawsuit. (*A.F. Brown, supra*, 137 Cal.App.4th at p. 1128.) Such anticipated litigation must be contemplated in good faith and be under serious consideration. (*Aguilar v. Goldstein* (2012) 207 Cal.App.4th 1152, 1162.) The “‘good faith’” and “‘under serious consideration’” requirement focuses on whether the litigation was genuinely contemplated. (*People ex rel. Fire Ins. Exchange v. Anapol* (2012) 211 Cal.App.4th 809, 824.) The “mere potential or ‘bare possibility’ that judicial proceedings ‘might be instituted’ in the future is insufficient to invoke the litigation privilege. [Citation.] In every case, the privileged communication must have some relation to an imminent lawsuit or judicial proceeding which is *actually* contemplated seriously and in good faith to resolve a dispute, and not simply as a tactical ploy to negotiate a bargain.” (*Edwards v. Centex Real Estate Corp.* (1997) 53 Cal.App.4th 15, 36 (*Edwards*).)

Appellants assert that the alleged defamatory statements related to “the proposed litigation that was going to be filed” against Kapral and therefore are entitled to protection as a prelitigation communication. In support of this position, appellants rely on Downs’s declaration.

However, as noted above, Downs did not recall making the statements at issue. Rather, Downs surmises that any such communication with the City in April 2013 would have related to the management change of VDC and the proposed litigation against Kapral. This vague account does not provide an objective way “to detect at what point on the continuum between the onset of a dispute and the filing of a lawsuit the threat of

litigation has advanced from mere possibility or subjective anticipation to contemplated reality.” (*Edwards, supra*, 53 Cal.App.4th at pp. 34-35.)

Appellants further rely on a letter written by Kapral’s attorney dated July 24, 2013. However, that letter reflects that Kapral was making claims against appellants regarding his removal and replacement as manager of VDC and demanding that appellants produce certain corporate documents. The letter also references a July 10, 2013, settlement offer made by Kapral. Thus, it was Kapral who was contemplating litigation.

In sum, appellants failed to carry their burden of demonstrating that the alleged defamatory comments are protected as statements Downs made in anticipation of filing a lawsuit against Kapral.

DISPOSITION

The order is affirmed. Costs on appeal are awarded to respondent.

LEVY, J.

WE CONCUR:

HILL, P.J.

PEÑA, J.